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The Commonwealth of Massachusetts
Executive Office of Public Safety
Fire Safety Commission

Automatic Sprinkler Appeals Board

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CHAIRMAN

PAUL DONGA
VICE CHAIR

Docket # 2006-129
130 Brighton Ave
Boston, MA

AUTOMATIC SPRINKLER APPEALS BOARD
DECISION AND ORDER

A) Statutory and Regulatory Framework

This is an administrative appeal held in accordance with Massachusetts General Laws Chapter 30A; Chapter 148, section 26G½ and Chapter 6, section 201, relative to a determination of the Boston Fire Department, requiring the installation of an adequate system of automatic sprinklers in a building owned and/or operated by Sunset Management Corporation, d/b/a The Sunset Grille and Tap (hereinafter referred to as the Appellant). The building, which is the subject of the order, is located at 130 Brighton Ave, Boston, MA.

B) Procedural History

By written notice received by the Appellant on April 24, 2006, the City of Boston Fire Department issued an Order of Notice to the Appellant informing it of the provisions of M.G.L c. 148, s.26G½, which requires the installation of an adequate system of automatic sprinklers in certain existing buildings or structures. The building subject to the order is located at 130 Brighton Ave, Boston, MA. The Appellant filed an appeal of said order on May 3, 2006. The Board held a hearing relative to this appeal on March 13, 2007, at the Department of Fire Services, Stow, Massachusetts.

Appearing on behalf of the Appellant was: Kurt Ruchala, Engineer/Consultant; Marc Kadish, President, Sunset Management; and David Donohue, Corporate Manager. Appearing on behalf of the Boston Fire Department was Assistant Fire Marshal George Wyman; Rich Baldowski, Engineer; and Chris Gilmore, Nightclub Inspector.

Present for the Board were: Thomas Coulombe, Acting Chairman; Steven P. Rourke, State Fire Marshal's Designee; Alexander McLeod; John Mahan; and George Duhamel. Peter A. Senopoulos, Esquire, was the Attorney for the Board.

C) Issue(s) to be Decided

Whether the Board should affirm, reverse or modify the enforcement action of the Boston Fire Department relative to the subject building in accordance with the provisions of M.G.L. c.148, s. 26G½?

D) Evidence Received

1. Application for Appeal by Appellant
2. Description of Facility and Statement in Support of Appeal
3. Order of Notice of the Boston Fire Department
4. Letter from Boston Fire Dept. to Appellant's Representative
5. Menu, Pictures, and Floor Plan of Facility
6. Notice of Pre-Hearing Status Conference to Appellant
7. Notice of Pre-Hearing Status Conference to Boston Fire Dept.
8. Letter to Sprinkler Appeals Board from Appellant
9. Notice of Hearing to Appellant
10. Notice of Hearing to Boston Fire Department
11. Liquor License
12. Entertainment License
13. Fire Dept. Photographs (A-M)

E) Subsidiary Findings of Fact

- 1) By notice received by the Appellant on April 24, 2006, the Boston Fire Department issued an Order of Notice to the Appellant requiring the installation of an adequate system of automatic sprinklers in a building located at 130 Brighton Ave, Boston, MA in accordance with the provisions of M.G.L. c. 148, s.26G½. The Appellant filed an appeal of said order on May 3, 2006. The Board held a hearing relative to this appeal on March 13, 2007, at the Department of Fire Services, Stow, Massachusetts.
- 2) This building is used by an establishment that operates under the name of The Sunset Grille and Tap, a private, for profit organization. The establishment provides public accommodations on two floors, consisting of approximately 1,197 s.f. in the basement and 2,700 s.f. on the first floor. According to the parties, as stipulated at the hearing, this establishment has a total occupancy of 276 persons throughout the facility. Except for the separate occupant limits for the basement level and the first floor, there was no breakdown of occupancy for separate bar, lounge, function or dining areas. Additionally, the parties stipulated that there was no information regarding the building's current use group classification.
- 2) Photographs submitted by the Appellant depict an open area that consists of a variety of seating arrangements, including high tables with high chairs, low tables with chairs, wooden tables with booths and chairs. There is a long wooden bar area with a substantially stocked beer bar, including scores of beer taps. There is a very large number of signs, neon lights, ornaments, artwork, and beer paraphernalia displayed within and throughout the establishment that promotes the sale of a substantial variety of specialty beers.

- 3) There is currently no physical or operational separation within the facility which establishes any delineation between a “bar” portion and a “dining area”.
- 4) The photographs depict a front exterior of the building consisting of glass windows with neon signs advertising the establishment “Sunset Grill & Tap” and prominent, multiple neon signs advertising various brands of beers.
- 5) The facility has been issued a license to expose, keep for sale and to sell “Wines and Malt Beverages with Liqueurs to be consumed on the premises”. The license contains a condition that said beverages are to be served only in conjunction with meals. Appellant testified that no “hard liquor” is served.
- 6) The Appellant contends that the establishment is principally used as a restaurant and is therefore specifically exempt from the sprinkler provisions of M.G.L. c.148, s.26G½. There was testimony and evidence in the form of menus and newspaper commentary that a wide range of substantial food items are featured. There was testimony that the percentage of liquor sales compared to food sales is 66% food and 34% liquor. However, it is noted that there were no documents or accounting records submitted to support this assertion. Other evidence presented at the hearing, in the form of copies of web sites, surveys, reviews and newspaper articles, clearly indicate that the sale of beer and liqueurs, is a significant and substantial customer attraction.

Menus feature the availability of a wide assortment of full course dinner meals, including Sunday brunch and lunch items. The “bar area” is also used for the service of meals. However, a customer can patronize this bar area and other areas of the establishment for the purchase of alcoholic beverages only, at any time during the hours of operation.

- 7) The restaurant holds an entertainment license that allows 1 game, a jukebox, 11 televisions and 7 wide screen televisions. The televisions are located throughout the establishment, including the basement level. Appellant testified that the establishment does not currently feature live musical entertainment. He testified that there are currently eight televisions, including 42” wide screen televisions. The facility is open daily until 1:00 a.m. The kitchen is open during all hours of operation.
- 8) The representatives of the Boston Fire Department issued the Order to install sprinklers based upon the overall building capacity, the existence of an extensive bar area and liqueur sales. The Fire Department contests the Appellant’s characterization of the establishment as principally a restaurant and indicates that the overall interior and exterior décor of the facility, and the presence of numerous beer taps, leads customers to believe the facility is more a bar than restaurant. Additionally, the fire department contends that there is a lack of separation to distinguish any “bar” area from a “restaurant” area.

F) Ultimate Findings of Fact and Conclusions of Law

- 1) The provisions of the 2nd paragraph of M.G.L. c. 148, s. 26G½, in pertinent part states:
“every building or structure, or portions thereof, of public assembly with a capacity of 100 persons or more, that is designed or used for occupancy as a night club, dance hall, discotheque,

bar, or similar entertainment purposes...(a) which is existing or (b) for which an approved building permit was issued before December 1, 2004, shall be protected throughout with an adequate system of automatic sprinklers in accordance with the state building code”. The law was effective as of November 15, 2004.

- 2) The statutory timeline for said sprinkler installation in accordance with the provisions of section 11, St. 2004, c.304, requires the submission of plans and specifications for the installation of sprinklers within 18 months of the effective date of the act (by May 15, 2006) and complete installation within 3 years of the effective date of the act (by November 15, 2007).
- 3) As testified and stipulated by the parties and supported by the license documents, this establishment is public assembly occupancy with a total capacity of 276 persons. Therefore, the subject building is considered a public assembly with a capacity of 100 persons or more.
- 4) This establishment currently does not feature live entertainment, a dance floor or dancing. Neither party offered any documentation indicating whether this building is classified as an “A-2” or an A-3” use group. Under the provision of the State Building Code, 780 CMR, the “A-2” classification includes establishments that are “designed for occupancy as dance halls, nightclubs and for similar purposes” (see 780 CMR 303.3). Under said 780 CMR, restaurants other than nightclubs, are classified within the A-3 use group (see 780 CMR 303.4). The particular use group classification is an important factor in determining whether this establishment is subject to the sprinkler requirements of M.G.L. c. 148, s. 26G½. However, this classification alone is not the sole factor that this Board will look at in making a determination. In a memorandum dated 1-10-05, this Board issued an interpretive guidance document relative to the provisions of this new law, c.148, s. 26G½. This new law was a portion of a comprehensive legislative initiative undertaken as the result of a tragic Rhode Island nightclub fire, which took place in February 2003. In said memorandum, this Board noted that the statute did not contain a definition of the words “nightclub, dance hall, discotheque, bar or similar entertainment purposes”. This Board reviewed the legislative intent and background of the statute and concluded that there were certain characteristics typical of nightclubs, dancehalls and discotheques. The board indicated that such occupancies are characterized, but not limited to, the following factors:
 - a) No theatrical stage accessories other than raised platform;
 - b) Low lighting levels;
 - c) Entertainment by a live band or recorded music generating above-normal sound levels;
 - d) Later-than-average operating hours;
 - e) Tables and seating arranged or positioned so as to create ill defined aisles;
 - f) A specific area designated for dancing;
 - g) Service facilities primarily for alcoholic beverages with limited food

service; and

- h) High occupant load density.

It was the interpretation of this board that such characteristics are typical of the “A-2 like” occupancy (which was a general reference to the A-2 use group referenced in 780 CMR, The State Building Code) and that these are the type of factors that heads of fire departments should consider in enforcing the sprinkler mandates of M.G.L. c.148, s. 26G½. It was noted that the list of characteristics was not necessarily all-inclusive. Additionally, the factors may be applied individually or in combination, depending upon the unique characteristics of the building at the discretion of the head of the fire department. Some of these particular characteristics, such as entertainment by a live band, recorded music generating above normal sound levels and a specific area designated for dancing, may not necessarily exist in certain establishments that are considered a “bar”. Nevertheless, the provisions of M.G.L. clearly apply to “every building or structure, or portions thereof, of public assembly with a capacity of 100 persons or more, that is designed or used for occupancy as a...**bar**...”.

- 5) In its 1-10-05 memorandum the Board acknowledged the existence of establishments that may feature characteristics of both a restaurant and a bar or nightclub. In determining whether or not such “combination” establishments are subject to the provisions of M.G.L. c.26G½ this Board looked at such common sense factors such as:

- a) Does the restaurant establishment regularly and routinely serve meals on a daily basis?
- b) Does the establishment provide a bar, bar seating, bar standing and a bartender for the purposes of serving alcoholic beverages directly to alcohol consuming customers?
- c) Does the bar and bar seating area have the ability to expand into the dining area to accommodate special entertainment activities or increased capacity/density?
- d) If the establishment provides a bar and bar seating, are alcoholic beverages continuously served to customers more than one hour after full kitchen facilities have been closed?
- e) Is live or recorded music provided for dancing purposes or for a viewing audience? (does not include background dinner music)?
- f) Does the establishment provide special entertainment, including but not limited to: musical, theatrical, comedy, or sport viewing activities?
- g) Based upon the establishment’s name, décor, atmosphere, does a customer expect a bar or nightclub type establishment?
- h) Is the establishment or portions thereof routinely or regularly used for private or public functions for dancing, parties, celebrations, entertainment or performance purposes?

- i) Does the establishment have an entertainment license?

These factors are not necessarily all inclusive. However, such factors or combination of factors may be considered to determine if the occupancy has existing activities or conditions that are similar to nightclub, dance hall, discotheque, bar, or similar entertainment purposes.

- 6) Based upon the evidence provided at the hearing, this establishment currently serves meals on a daily basis. However, in looking at the characteristics as a whole, it also features substantial characteristics typical of a bar as that term is used in s. 26G½.
 - a) The establishment features later than average operating hours. It is routinely open until 1:00 a.m. This late hour is well beyond the usual hours of operation of an establishment that is typically operated principally as a restaurant.
 - b) The establishment holds a “wine and malt beverage with cordials” liquor license and features bar service, bar seating and a bartender during all hours of operation for the purposes of serving alcoholic beverages directly to alcohol consuming customers. Alcoholic beverages are available to customers at all times of operation whether or not they choose to eat a meal or not.
 - c) There was testimony, which indicates that the kitchen remains open during all hours of operation and that a substantial proportion of income is derived from the service of food. However, the Appellant did not provide verified accounting records to support their assertion. Appellant did clearly emphasize that the establishment is noted for its wide variety of beers and that some of the beers sell for \$100.00 per glass. Additionally, the Appellant indicated that less expensive, \$4.00 beers, are also available.
 - d) Based upon the establishment’s name and presentation to the general public, a customer can reasonably expect significant “bar” or pub-like accommodations. The business name “Sunset Grill & Tap” clearly indicates that it provides both food and alcoholic beverages. Additionally, the Board finds overwhelming evidence that this establishment is clearly marketed as an establishment that offers an extraordinary selection of specialty beers in a bar or pub type setting. The front exterior of the building consists of large glass windows with numerous neon signs advertising the name of the establishment “The Sunset Grill & Tap” and the wide selection of beers. Clearly, any reasonable person could correctly assume that it is the type of establishment that features beer as a main attraction. The interior of the establishment features a décor and atmosphere typical of a bar or pub. The open area consists of a variety of seating arrangements including a stocked bar with bar stools, high tables with high stools in addition to several wooden tables and booths with chairs and benches. There are numerous signs, ornaments, artwork, beer coasters, and beer paraphernalia displayed within the establishment that promote various types of beers. Additionally, based upon the total floor area and legal capacity limits, this establishment has the potential for concentrated occupancy.
 - e) Although the establishment features a significant assortment of food items typical of a restaurant, looking at the characteristics as a whole, this establishment is not merely

“principally a restaurant” as those terms are used to warrant an exemption from the sprinkler requirements. Numerous copies of web sites, surveys, reviews and newspaper articles were submitted at the hearing, which establish the nature and characteristics of this facility. According to such documentation a very significant attraction to customers is obviously the unique service and selection of beer and specialty liquors. One of these commentaries, found on the internet, is typical: “If it’s out there, it’s in here” – “every conceivable beer” ever brewed, it seems, can be had at this Allston bar: while the “rowdy” “twenty something” “crew of regulars estimate “eleventy gazillion, the actual list of nearly 500 is plenty staggering, as is the similarly huge variety of good American munchies, though some suggest the food isn’t why you go and neither is the crapshoot services.” Consistent with this conclusion is Appellant’s statement that the establishment has on several occasions been awarded the area’s “best beer selection”.

- f) Furthermore, there was testimony indicating that a free food buffet is provided on Sunday, Monday and Tuesdays between midnight and 1:00 A.M. as long as patrons order at least two drinks. The offering of free food further supports this Board’s conclusion that this establishment clearly seeks to attract persons into the establishment to drink alcoholic beverages.
- 7) Appellant’s position that this establishment is “principally a restaurant” and therefore exempt from the provisions of M.G.L. c. 148 s. 26G½ is without merit. Although the facility currently provides an attractive assortment of food items, this facility is clearly and legally designed, used and marketed as a pub or bar with a legal capacity of 100 or more persons within the legislative intent and scope of the sprinkler provisions of section 26G½.

G) Decision and Order

For the foregoing reasons, this Board unanimously **upholds** the Order of the Boston Fire Department to install sprinkler protection in the subject building in accordance with the provisions of M.G.L. c.148, s.26G1/2. Sprinklers shall be installed in accordance with the timeline stated in section 11 of chapter 304 of the Acts and resolves of 2004 (completed installation by November 15, 2007). Plans for such installation shall be submitted to the Boston Fire Department within ninety (90) days of the date of this decision.

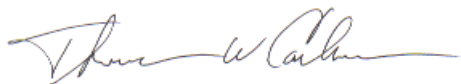
H) Vote of the Board

Thomas Coulombe, Acting Chairman	In Favor
Steven P. Rourke, Marshal Designee	In Favor
Alexander MacLeod	In Favor
John J. Mahan	In Favor
George Duhamel	In Favor

I) Right of Appeal

You are hereby advised that you have the right, pursuant to section 14 of chapter 30A of the General Laws, to appeal this decision, in whole or in part, within thirty (30) days from the date of receipt of this order.

SO ORDERED,



Thomas Coulombe, Acting Chairman

Dated: May 14, 2007

A COPY OF THIS DECISION AND ORDER WAS FORWARDED BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED TO:

Kurt Ruchala, FirePro, Inc.
Big City
100 Burt Road, Suite 116
Andover, Massachusetts 01810

1st Class Mail, Postage Pre-paid to:

Chief George Wyman
Boston Fire Department – Fire Prevention
1010 Massachusetts Ave, 4th Floor
Boston, Massachusetts 02118

SECTION 11. Any owner of a building, structure or portions thereof subject to the provisions of the second paragraph of [section 26G 1/2 of chapter 148](#) of the General Laws shall submit plans and specifications for the installation of an adequate system of automatic sprinklers to the head of the fire department and the local building inspector or inspector within 18 months of the effective date of this act and shall install an adequate system of automatic sprinklers within 3 years of such effective date. The head of the fire department may allow a reasonable extension of time, not to exceed 1 year, to comply with said section 5 if the owner has timely submitted the required plans and specifications, has entered into an existing contract for the installation and clearly documents or shows that he did not cause the delay of installation.